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FOREIGN CURRENCY JUDGMENTS: THE SCOTTISH EXPERIENCE

G. MAHER*

I. INTRODUCTION

THE decision of the House of Lords in 1975 in the case of *Miliangos v. George Frank Textiles Ltd*¹ was hailed as revolutionary.² In *Miliangos* the House of Lords held that it was competent for English courts to give a judgment for a sum of money in a currency other than sterling; and further that if the judgment sum had to be converted into sterling, conversion could be made at the date when the court authorised enforcement of the judgment. In arriving at this conclusion the House overturned a long line of authority (including a relatively recent decision of the House itself in the case of *In re United Railways of Havana and Regla Warehouses*)³ for the contrary position that judgment could be given only in sterling and claims for sums in foreign currency must be converted into sterling as at the date of breach of contract or breach of duty, or other cause of action. In *Miliangos* their Lordships were careful to point out that their decision was confined to claims for payment in foreign currency with the characteristics of that particular case.⁴ However, it soon became apparent that the principle of the *Miliangos* decision was to have revolutionary implications. Since 1975 the English courts, including the House of Lords in a later appeal, have applied the rationale of the *Miliangos* case to a very wide range of legal issues.⁵ As with many revolutions its effects could not be confined to one country and the *Miliangos* case was the catalyst for change of the sterling judgment/breach-date rule in other jurisdictions.⁶

One of the earliest examples of the borrowing of the *Miliangos* rule occurred in England's contiguous legal neighbour, Scotland. The decision

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1. [1976] A.C. 443.

2. J. H. C. Morris, "English Judgments in Foreign Currency: A 'Procedural' Revolution" (1977) 41 *Law and Contemporary Problems* 44; *Barclays Bank International Ltd v. Levin Brothers (Bradford) Ltd* [1977] 1 Q.B. 270, 282E (per Mocatta J): "In my view, however, the decision in the *Miliangos* case has revolutionised the position and has disposed of the once common assumption that foreign currency must be treated by our courts as if a commodity, e.g. a foreign cow."

3. [1961] A.C. 1007.

4. [1976] A.C. 443, 467G-468A (per Lord Wilberforce), 497H-498A (per Lord Cross of Chelsea).

5. Dicey and Morris, *The Conflict of Laws* (12th edn), pp.1583-1590; Cheshire and North, *Private International Law* (12th edn), pp.97-105.

6. For discussion see F. A. Mann, *Legal Aspects of Money* (5th edn), p.354; Dicey and Morris, *idem*, p.1583, n.30.

of the Inner House of the Court of Session in *Commerzbank AG v. Large*⁷ has many parallels with the *Miliangos* case, which in turn was an influence, even if not the only one, on the Scottish courts adopting a position almost identical to that accepted in *Miliangos*. Since the time of the *Commerzbank* decision there have been a number of further developments in Scotland on judgments (or to use the proper technical Scottish term, decrees) in foreign currency. This article will examine these developments but it must be said at the outset that the Scottish decisions are less comprehensive in scope than their English counterparts. It must also be pointed out that the Scottish judges have not always set out any clear or articulate principle or principles for their decisions on foreign currency judgments. Although the decisions of the English courts are undoubtedly a factor in the Scottish cases, doubts remain as to the extent to which the English cases have been accepted and also whether they are the sole influence on the development of Scots law on this topic.

II. THE *COMMERZBANK* DECISION

THE starting point for consideration of this topic is the *Commerzbank* case. As with *Miliangos*, the facts were straightforward and gave rise to the same single issue. In *Commerzbank* the pursuers were a German-based bank which sued the defender, who had been stationed in Germany while serving with the British Army, for payment of a sum owing on a loan account. The conclusion of the summons, which was closely modelled on the form of the House of Lords' judgment in *Miliangos*, was for payment of a sum expressed in Deutschmarks (DM) or the sterling equivalent thereof at the date of payment or the date of extract, whichever was the earlier.

The action was undefended but the Lord Ordinary had doubts about granting decree in terms of the conclusion and accordingly reported the case to the Inner House of the Court of Session.⁸ The Inner House approved the form of the decree in terms of the conclusion of the summons. In Scottish procedure, enforcement of a court decree is made by obtaining an official copy (or "extract") of the decree, and the extract is authority for the various enforcement procedures (diligence). In general terms diligence is not specifically authorised or supervised by the court which grants decree. Accordingly, the latest stage at which the court is involved in an action is the granting of the extract of the decree. This feature explains the form of the conclusion, and also the form of decree, in

7. 1977 S.C. 375.

8. This is a mechanism whereby a case at first instance in the Court of Session may be sent to the Inner House, which has an appellate jurisdiction, in order to obtain an authoritative decision on some point of difficulty or importance: D. Maxwell, *The Practice of the Court of Session*, pp.243-244; *Stair Memorial Encyclopaedia*, Vol.6: *Courts and Competency*, para.927.

Commerzbank, as the date of extract is the latest at which conversion into sterling can be left in terms of sheer practicality.⁹ The Court also set out the procedure to be followed when extract is obtained and the sum is to be converted into sterling at that date.¹⁰

So far, the *Commerzbank* approach is virtually identical to that in *Miliangos*. When it comes to considering the reasoning behind the conclusion reached by the Court in *Commerzbank*, however, it is more difficult to determine whether the two cases remain similar. But in one particular aspect of judicial reasoning there is another parallel between the two decisions. Just as the line of cases which culminated in the *Miliangos* appeal in the House of Lords had involved "some distortion of the judicial process",¹¹ so also in *Commerzbank* the Court was involved in a process of reasoning which has been described by a very learned commentator as "lighting a brush fire in the jurisprudence of judicial precedent".¹²

To understand this issue of legal reasoning and precedent, it is necessary to go back to an early nineteenth-century Scottish appeal, *Hyslops v. Gordon*.¹³ In that case the House of Lords overturned a decision of the Inner House of the Court of Session which had given judgment for payment of a sum in American dollars. Lord Gifford (who is the only member of the House whose speech in the appeal is reported) stated that the judgment should have been given in sterling with conversion of the sum from dollars into sterling at the rate of exchange prevailing at the date the action was started. Although this was a decision of the House of Lords, it was not cited to the House in *Miliangos*. However, *Hyslops v. Gordon* was noted by Lord Fraser of Tullybelton, the only Scottish member of the Appellate Committee in *Miliangos*, but this was after the hearing of the appeal. As no argument had been presented to the House on this precedent, the House in *Miliangos* was not in a position to depart formally from, or to overrule, *Hyslops*.¹⁴

9. It must be noted, however, that the Court in *Commerzbank* left open the possibility that a later date for conversion might be procedurally acceptable: 1977 S.C. 375, 383.

10. This is that the pursuer's solicitors have to provide to the court official who issues the extract a certified statement of the appropriate exchange rate at the date when the extract is sought and sterling equivalent of the judgment sum at that rate. These general provisions have been further refined in subsequent rules of court and practice directions: see *Court of Session Practice Note*, 9 July 1980, para.5A: Sheriff Court Ordinary Cause Rules, r.30.3.

11. [1976] A.C. 443, 459C (*per* Lord Wilberforce), describing the problems arising from the approach of the Court of Appeal in *Schorsch Mier GmbH v. Hennin* [1975] Q.B. 416, and in *Miliangos* itself at the Court of Appeal ([1975] Q.B. 487).

12. Alan Rodger, "The Strange Demise of *Hyslops v. Gordon*", in A. J. Gamble (Ed.), *Obligations in Context*, p.1 at p.2. Rodger's important discussion of *Hyslops v. Gordon* is discussed further below.

13. (1824) 2 Sh. App. 451.

14. Rodger, *op. cit. supra* n.12, at p.3. In any case there are doubts whether the House of Lords has power to overrule one of its own Scottish precedents in a later English appeal, or vice versa: see *Stair Memorial Encyclopaedia*, Vol.22: *Judicial Precedent*, para.277.

Nonetheless, in *Miliangos* Lord Fraser did venture the comments that in *Hyslops* the reason for the House's decision on the point about the currency of the judgment was the then difficulty in ascertaining the rate of exchange at the date the action had been raised. His Lordship noted that this reason no longer applied and concluded that *Hyslops* should be treated as decided in accordance with a practice that existed in circumstances which were very different from those of the present time and that as a consequence *Hyslops* was not necessarily to be followed now.¹⁵

These comments certainly left the status of *Hyslops* as a precedent open to doubt, without actually overruling it. In *Commerzbank* the Inner House noted Lord Fraser's comments and built upon them. Their Lordships accepted that *Hyslops* was the only case which presented an obstacle to their approving the decree in the form sought by the pursuers, but following Lord Fraser's lead, the Inner House held that as *Hyslops* was decided in the context of conditions which no longer applied, the decision was not now binding on the Court of Session.

To say the least, this approach is remarkable, for a court has refused to follow a House of Lords decision which, though "doubted", had not been overruled. Indeed it is difficult to reconcile the approach of the Court of Session with the express words of the House of Lords in *Miliangos* itself that the only judicial means by which decisions of the House of Lords can be reviewed is by the House itself acting under its powers under the 1966 *Practice Statement*.¹⁶

No matter the correctness of its approach, the Court of Session, once it had freed itself of the problem of *Hyslops*, went on to consider the true objectives of the law on foreign currency judgments. Perhaps surprisingly, the first authority which it considered was a work published in the middle of the seventeenth century, the *Jus Feudale* by Sir Thomas Craig of Riccarton.¹⁷ Passages from this work were cited at length in the Inner House's judgment in *Commerzbank*.¹⁸ These passages discuss the situation of the proper currency in which payments due under a contract are to be made and are to the effect that the parties should be held to the strict terms of their agreement; and that where the contract does not specifically deal with the matter of currency, the risk arising from depreciation in the value of currency should fall either on the creditor or debtor depending on

15. [1976] A.C. 443, 503B.

16. *Idem*, p.459E-F (per Lord Wilberforce), and by two other members of the Appellate Committee in *Miliangos*, but significantly not by Lord Fraser. See Lord Simon of Glaisdale at *idem*, pp.470H-471A; Lord Cross of Chelsea at *idem*, p.496C-D. For discussion of the problems of judicial precedent arising from the *Commerzbank* case, see *Stair Memorial Encyclopaedia*, *op. cit. supra* n.14, at para.353; A. A. Paterson and T. St J. N. Bates, *The Legal System of Scotland* (3rd edn), pp.408-409; Rodger, *op. cit. supra* n.12, at pp.2-5.

17. For discussion of Craig as one of the "institutional" writers of Scots law, see *Stair Memorial Encyclopaedia*, *idem*, paras.534 *et seq.*

18. *Jus Feudale*, 1.16.22, 23.

whether the creditor has refused timeous payment or, alternatively, whether the debtor has been late in making payment. The Court then declared that these objectives were the same as those of English law as set out by the House of Lords in *Miliangos*, and to support this view the Court cited two passages from the speeches in *Miliangos*, namely those of Lord Wilberforce¹⁹ and Lord Fraser of Tullybelton.²⁰

It must be noted how narrow is the basis which these various authorities provide for the Inner House's decision. The passages from Craig deal only with the proper currency for payment of a contractual debt and do not consider procedural issues such as the form of decrees in which such debts are to be recovered. The question of procedure is dealt with in the two excerpts from the speeches in *Miliangos* but it is difficult to identify a more fundamental basis for the Inner House's decision other than that²¹

justice requires that a foreign creditor who is entitled to payment of a debt due in the currency of his own country or the currency of a particular foreign country should not be bound to accept payment of the debt in the money of his debtor's currency if any prejudice would be caused to him thereby.

The narrowness of the focus taken by the Inner House was at least consistent with its approach to the question before it, for the Inner House also stated that different questions might arise with other types of claim in foreign currency but on all such matters the Court reserved its opinion.

The *Commerzbank* case then was very much like *Miliangos* in its factual background as well as the eventual outcome, and each is the first modern case in which a judgment in currency other than sterling was approved. However, the two decisions are significantly different in the ways in which they laid foundations for future developments. Although in both *Commerzbank* and *Miliangos* the Court expressly limited its decision to the issue arising from the facts of the case before it, *Miliangos* involved a more considered and detailed discussion of the underlying principles, and the English courts in subsequent cases have not found it difficult to apply the *Miliangos* approach to other issues. By contrast, it is not easy to discern from the *Commerzbank* decision a general principle on foreign currency decrees which allows for straightforward application to different types of case. At the time of the decision in *Commerzbank* commentators pointed out that, as there was unlikely to be a vast number of cases on foreign currency decrees in Scotland, the Court in *Commerzbank* could usefully have given guidance on these future issues.²² To a great extent these obser-

19. [1976] A.C. 443, 465G-H.

20. *Idem*, p.501F-H.

21. 1977 S.C. 375, 383.

22. D. J. Cusine, "More Fair Exchange" (1978) 23 J. Law Soc. Scotland 136, 137; E. A. Marshall, "Decrees in Foreign Currency. Following Craig or Miliangos?" 1978 S.L.T. (News) 77, 79.

ventions have been borne out. *Commerzbank* remains the only Inner House decision on the subject of foreign currency decrees. The cases subsequent to *Commerzbank* fail to bring out any articulated principle of decision.

Two factors in particular are at the basis of the concern expressed by commentators at the Court's failure in *Commerzbank* to indicate any underlying principle or set of principles for its decision. The first is whether the Court correctly understood the *Hyslops* decision which it sought so much to avoid having to follow. The second factor is the failure by the Court to consider the extent to which Scots law had accepted the long-standing rule of English law on sterling judgments and breach dates.

On the first of these points, research by Dr Alan Rodger has clearly shown that *Hyslops v. Gordon* was misunderstood both by Lord Fraser in *Miliangos* and by the Inner House in *Commerzbank* as well as by commentators on the problems for judicial precedent which *Hyslops* presented in these later cases.²³ Dr Rodger points out that Lord Fraser's explanation for the House of Lords' decision in *Hyslops*, namely problems in ascertaining the correct rate of exchange, cannot be correct. Such an explanation is not only unlikely given the background of the case (which concerned a joint venture engaged in international trade) but also contradicts a passage in Lord Gifford's speech in *Hyslops*.²⁴

Dr Rodger also suggests that the reasons the House of Lords in *Hyslops* reversed the Court of Session (which had given decree in US dollars) were, first, because the pursuer in his own pleadings had sought decree in sterling and had further sought conversion into sterling at the date of citation (i.e. raising the action); second, that the particular form of the Court of Session decree (which ordered payment of a sum "payable in dollars in New York") presented formidable problems of enforcement in Scotland. What comes out of these considerations is that in *Hyslops* Lord Gifford was not resorting to a hard-and-fast rule that Scottish courts could not grant decree in a foreign currency.

Furthermore, Dr Rodger points to subsequent House of Lords decisions in Scottish appeals in which Lord Gifford accepted decree being given in foreign currency with conversion into sterling at the date judgment was given.²⁵ Dr Rodger surmises that the actual practice of the Scottish courts, including the House of Lords, in the early nineteenth century was not too different from that of the post-*Miliangos/Commerzbank* era.

23. Rodger, *op. cit. supra* n.12.

24. *Idem*, p.4, citing *Hyslops v. Gordon* (1824) 2 Sh. App. 451, 460: "there is a foundation laid for a very speedy termination of this cause, when the Court shall have ascertained the amount in English money, on which the Court will have easy means of information as to the rate of exchange at the time".

25. Rodger, *idem*, pp.9-10, citing *M'Braire v. Hamiltons* (1826) 2 W. & S. 66; *Fergusson v. Fyffe* (1838) 16 S. 1038, (1841) 2 Rob. 267.

His general conclusion is that the approach to *Hyslops* by Lord Fraser in *Miliangos* and by the Inner House in *Commerzbank* was not only mistaken but unnecessary and that, in *Commerzbank*, *Hyslops* could easily have been distinguished on its own facts.

A second perceived weakness in the *Commerzbank* decision is the failure by the Court to examine the basis in Scottish authorities for the sterling judgment/breach-date rule. In *Commerzbank* the Court cited and followed passages in Craig's *Jus Feudale* which suggest that Scots law, at least in the seventeenth century, did not follow this rule, but nowhere in the decision is there any attempt to show how and when the English rule was received into Scots law.

It has already been noted that the three House of Lords decisions referred to above,²⁶ including *Hyslops* properly interpreted, are if anything authority against the English rule being part of Scots law. Even *Hyslops* on its traditional interpretation supports only the first leg of the rule, and not the breach-date element. Furthermore, *Hyslops* was not generally interpreted by earlier Scottish judges or writers as being an older Scottish equivalent of the *Havana Railways* case. *Hyslops* itself is referred to in two older texts, McGlashan's *Practical Notes*²⁷ and Maclaren's *Court of Session Practice*,²⁸ but not as authority for the rule attributed to it by Lord Fraser in *Miliangos* or by the Court in *Commerzbank*.

Of more recent, but pre-*Commerzbank*, writings Anton in the first edition of his book on private international law refers to *Hyslops* in his discussion of claims for sums in foreign currency as authority for the proposition that a court will not give a decree for payment of an amount in foreign currency.²⁹ In this context Anton cites two other Scottish cases. The first of these, *Ibbetson*,³⁰ is referred to as vouching the proposition that the pursuer's claim must be expressed in sterling. However, that proposition is not part of the *ratio* of that case. In *Ibbetson* registration was sought in Scotland under the Administration of Justice Act 1920 of a Kenyan judgment expressed in Kenyan shillings. The Lord Ordinary held that the 1920 Act contained no provision for converting the judgment sum into sterling, and consequently, as there would be difficulty in enforcing such a judgment in Scotland, he exercised his discretion (under section 9(1) of the 1920 Act) and refused registration. The other Scottish case is *Macfie's*

26. *Hyslops*, *supra* n.24; *M'Braire and Fergusson*, both *ibid*.

27. (4th edn, 1868), p.164, para.923. This passage lends no support to the view that a decree must be expressed only in sterling. If anything it is consistent with the opposite view. The passage reads: "A decree which awarded a sum of *Sterling* money, where the summons concluded for *Halifax* currency, was held to be *ultra petita*."

28. (1916), p.307, citing *Hyslops and Fergusson v. Fyffe* in the context of rate of interest on decrees. The report of *Hyslops* at the stage of the Inner House is also referred to at pp.297 and 924 on the issue of expenses.

29. A. E. Anton, *Private International Law* (1st edn, 1967), p.551. See also *idem*, p.231.

30. 1957 S.L.T. (Notes) 15.

Judicial Factor v. Macfie,³¹ which Anton cites as authority for the breach-date element of the traditional rule. In *Macfie's Judicial Factor* a Lord Ordinary refused to grant decree which sought payment of a sum in sterling which was the equivalent of a specified sum of US dollars converted at the date of decree. The Lord Ordinary held that the correct date for conversion into sterling was the date of the emergence of the defender's liability to pay but the authorities which the Lord Ordinary cited to back his conclusion were a passage from Dicey³² and two English cases, *SS Celia v. SS Volturmo*³³ and *In re British American Continental Bank Ltd.*³⁴

In another pre-*Commerzbank* work, D. M. Walker states the traditional sterling decree/breach-date rule as representing Scots law but all the authorities which he cites in this context are English.³⁵

It is against this general background of uncertainty as to the true position of Scots law that the differences between the decisions in *Miliangos* and *Commerzbank* become apparent. In *Miliangos* the decision of the House of Lords was truly revolutionary in that a long-established rule of English law was clearly overturned. Moreover, the speeches in *Miliangos* set out a firm foundation for development of its underlying principles in later cases which deal with different issues and situations. In *Commerzbank* the picture is quite different. First, it is not at all clear what the Scottish position on foreign currency decrees truly was at the time of the decision. The authorities for stating that Scots law had accepted the same rule as that of English law are sparse, and one of the authorities cited by the Court in *Commerzbank*, Craig's *Jus Feudale*, suggests that Scots law had developed on different lines from English law.

Second, the failure of the Court in *Commerzbank* to explore the real basis of Scots law on foreign currency decrees also means that the future development of Scots law in this area remains problematic.³⁶ By considering authorities such as Craig, the Court in *Commerzbank* hinted at a distinctively Scottish basis for foreign currency decrees but the judgment in *Commerzbank* does not identify or articulate any guiding principles apart from that used to decide the particular issue before the Court in that case. On the other hand, the approval given to *Miliangos* was selective. In *Commerzbank* the Court followed the general approach taken by the House of

31. 1932 S.L.T. 460.

32. (5th edn), p.729.

33. [1921] 2 A.C. 544.

34. [1922] 2 Ch. 589; [1923] 1 Ch. 276.

35. D. M. Walker, *Civil Remedies* (1974), pp.34, 393-394.

36. It must be borne in mind that the *Commerzbank* action was undefended and accordingly the Court did not have the benefit of full argument from a contradictor. On the other hand the whole point of sending the case on report to the Inner House was to obtain an authoritative ruling.

Lords in *Miliangos* but refrained from agreeing with all of the detail of the House's reasoning. For Scots lawyers this position leaves the problem of guessing to what extent English cases which built upon *Miliangos* are themselves to be followed in later Scottish cases.

III. CASES SUBSEQUENT TO *COMMERZBANK*

SINCE the *Commerzbank* decision a number of Scottish cases have dealt with issues of foreign currency decrees but to date these have been decided by judges at first instance.³⁷ These cases may usefully be considered under the following headings.

A. Debt

Apart from *Commerzbank* only one case has concerned claims for sums in foreign currency for debt by way of contractual payment. The decision at first instance in *L/F Foroya Fiskasola v. Charles Mauritzen Ltd*³⁸ was given after the speeches in *Miliangos* but before the judgment in *Commerzbank*. The pursuers claimed sums in Danish currency due under a contract with the defenders or, alternatively, the sterling equivalent at the date of payment. Although the sheriff accepted that the reasoning in *Miliangos* was of very great persuasive authority, he found himself unable to grant decree as sought by the pursuers. This was for two reasons. First, the sheriff held himself bound by *Hyslops v. Gordon*, which he took as authority for the proposition that decree could only be given in sterling. Second, the sheriff noted that there might be procedural problems about converting a foreign currency decree into sterling and in enforcing such a decree.

This decision was appealed to the sheriff principal but by the time judgment was given in the appeal³⁹ the Inner House in *Commerzbank* had swept away the two bases for the sheriff's decision. However, the sheriff principal refused to grant decree as sought by the pursuers. His Lordship noted that it did not follow from the point of procedure that a Scottish court could grant decree in a foreign currency that "it is competent to sue in a Scottish court for payment of a contract debt in terms of a foreign currency where that currency was not the currency of the contract or of payment under the contract".⁴⁰ Under the contract in the present case the money of account and the money of payment of the contract were sterling. The pursuers had included in their pleadings an averment that the proper

37. *L/F Foroya Fiskasola v. Charles Mauritzen Ltd* 1977 S.L.T. (Sh. Ct.) 76 was appealed to the sheriff principal (1978 S.L.T. (Sh. Ct.) 27). The sheriff principal hears appeals as a single judge. His decisions are not binding precedents for the Court of Session or for a sheriff in another sheriffdom.

38. 1977 S.L.T. (Sh. Ct.) 76.

39. 1978 S.L.T. (Sh. Ct.) 27.

40. *Idem*, p.29.

law of the contract was Danish law, and that according to Danish law payment of a contract debt was to be made in Danish currency where, as in this case, there had been a delay in making payment in a non-Danish currency. However, the sheriff principal held that there was not a sufficient basis for pleading that Danish law was the proper law. There was only a bare averment to that effect, and this appeared to contradict other of the pursuers' averments which suggested that the proper law was Scots law.

B. Breach of Contract

Only two decisions have touched upon damages for breach of contract but in neither has there been any major discussion of the principles involved. In *MT Group v. Howden Group plc*⁴¹ the pursuers (a Danish company) raised an action against a Scottish company for payment of a sum expressed in Danish kroner. This sum was for damages for loss sustained by them and recoverable under a guarantee given by the defenders in respect of breach of contract made by a subsidiary company of the defenders. No reference is made in the report of the case to the issue of the conclusion for payment in foreign currency. Indeed the report is concerned with an argument raised by the defenders that the Scottish court was *forum non conveniens* and that the action would be more appropriately heard in the Danish courts. In the event the Lord Ordinary refused to sustain this argument, at least as at that stage of the action.⁴²

In another case dealing with damages for breach of contract, there were *obiter* comments on the question of foreign currency claims. In *Alberta Distillers Ltd v. Matthew Gloag (Overseas) Ltd*⁴³ the pursuers sought damages for an alleged breach of contract made by the defenders, who were said to have prematurely terminated a contractual arrangement between the parties whereby the pursuers were to act as the defenders' agents in Canada. It appears that the pursuers claimed a sum in damages in sterling, not Canadian dollars. Objection was taken as to the sufficiency of detail provided in the pursuers' pleadings, but after amendment the pleadings were held to provide fair notice of the pursuers' case. However, a subsidiary objection was made by the defenders that the pursuers' conclusion should have been expressed in Canadian dollars, not in sterling. This argument was countered by a submission by the pursuers that in actions for breach of contract the sum claimed was to be converted into sterling at the

41. 1993 S.L.T. 345.

42. Surprisingly no reference is made in the judgment to the fact that jurisdiction in this action appears to be governed by the Brussels Convention, as implemented by the Civil Jurisdiction and Judgments Act 1982, and that in general terms under the Convention no plea of *forum non conveniens* may be raised. See Anton, *op. cit. supra* n.29 (2nd edn), at p.212; Dicey and Morris, *op. cit. supra* n.5, at pp.400-402; Cheshire and North, *op. cit. supra* n.5, at pp.331-334.

43. 23 Dec. 1992, Outer House of the Court of Session.

rate of exchange prevailing at the date of breach. Of these submissions the Lord Ordinary preferred that made by the pursuers. The Lord Ordinary's judgment does not indicate whether counsel in their respective submissions made any reference to authority and no cases are cited by the judge in his judgment.

It must be said that given developments in English law on breach of contract claims in foreign currency, especially the House of Lords' decision in *The Folias*,⁴⁴ it is difficult to see either why these authorities were ignored or what principle Scots law is following in applying the breach-date rule for claims in foreign currency for breach of contract. Again, the failure by the Court in *Commerzbank* to give guidance for a wider range of cases has left Scots law on this particular point in a state of some confusion.

C. Delict

Most of the post-*Commerzbank* cases on foreign currency decrees involve claims for damages in delict. Three of these cases deal with claims arising from the situation where a visitor to Scotland has suffered injuries or has been killed in a road accident. In *Worff v. Western SMT Co. Ltd*⁴⁵ a 32-year-old man of Californian residence died after being involved in a traffic accident in Scotland. In an action raised by his widow and children four headings of claim were made, and of these three were awarded in US dollars. These were for funeral expenses, loss of services and loss of support. The remaining head was loss of society, which is aimed at compensating the deceased's relatives in respect of non-patrimonial injury such as grief and distress.⁴⁶ This award was made in sterling (£9,000 for the widow, and sums of £4,750, £5,550 and £6,500 for the children). These sums were then converted into dollars at the rate of exchange at the date of the judgment. This case is broadly consistent with the approach taken to claims in tort set out in the House of Lords' decision in *The Despina R*⁴⁷ and in particular with an English decision on personal injuries, *Hoffman v. Sofaer*.⁴⁸ However, in the Scottish case no reference is made to either of these authorities, nor is any explanation given why the figures for loss of society were originally assessed in sterling and then converted into dollars at the date of judgment.

44. [1979] A.C. 685.

45. 1987 S.L.T. 317.

46. Damages (Scotland) Act 1976, s.1(4). This provision has since been amended by the Damages (Scotland) Act 1993, s.1, which replaces an award for loss of society with a broader heading of damages recoverable by the relatives of a deceased person.

47. [1979] A.C. 685.

48. [1982] 1 W.L.R. 1350.

A similar approach was taken in another reparation action, *Fullermann v. McInnes's Executors*.⁴⁹ Here the pursuer (who was resident in Switzerland and had suffered injuries in a traffic accident) was awarded various items of patrimonial loss in Swiss francs but the award for solatium (damages for pain and suffering) was made in sterling (£42,500). In this case the defenders made an explicit objection to the damages for patrimonial loss being made in a foreign currency, on the argument that the measure of the defenders' liability was to be established at the date of decree, and that it was illogical for the pursuer to be awarded decree in sterling for solatium but in Swiss francs for patrimonial loss. Counsel for the defenders made reference to Scottish and English authorities on foreign currency judgments but the Lord Ordinary held that the present case fell directly within the scope of *The Despina R* and that the award for patrimonial loss should be expressed in Swiss francs with the alternative of the equivalent sum in sterling at the earlier of the date of payment or date of extract. However, although *Hoffman v. Sofaer* was mentioned in argument, the Lord Ordinary made no reference to the distinction between different currencies for patrimonial and non-patrimonial losses.

The most recent case involving death or personal injuries is *Bhatia v. Tribax Ltd*,⁵⁰ which was concerned with the death in Scotland of a man who had been resident in Germany, from where he ran his business. An action was raised by his widow and children. The parties agreed various sums in respect of loss of society, and these sums were expressed in sterling. Awards for loss of support and loss of services were assessed in DM, reflecting the fact that the deceased had resided and set up a business based in Germany. As regards an award for funeral expenses, the parties agreed that these amounted to £4,015 but the Lord Ordinary also accepted a submission by the defenders that this sum should be reduced by DM 2,800, which was the amount that the widow had received as a refund under German social security law. However, no indication is given in the judgment as to how this process of subtraction was to be made. Presumably the figure in DM was to be converted into sterling but it is not clear as to the date for the rate of exchange (date of receipt of the refund, date of judgment, date of extract).

An added complication in *Bhatia* is that the pursuer in this case did not seek decree in DM but in sterling. This was not opposed by the defenders but the parties were at odds as to the appropriate date for conversion of the sums assessed in DM into sterling. In their pleadings the pursuers, in

49. 1993 S.L.T. 259. For comment on this case see J. Blaikie, 1993 S.L.T. (News) 184.

50. Outer House of the Court of Session. Two separate judgments have been issued in this case. The first, dated 20 Aug. 1993, is noted at 1993 G.W.D. 35-2258; the second, dated 23 Dec. 1993, at 1994 G.W.D. 6-346.

order to show the income which the deceased had earned from his business, set out the annual profits of the business along with the conversion of these sums into sterling at the rate prevailing at the end of each year. The defenders argued that as the pursuers had stated various figures in their pleadings in DM along with the sterling equivalents they were bound to accept the conversion as made from year to year, i.e. in terms of the figures in the pleadings. However, the Lord Ordinary held that the currency equivalents were used to provide further and more specific narrative in the pleadings and did not bind the pursuers to conversion into sterling at those dates. The pursuers argued that the appropriate date for conversion was the date of the proof (trial of evidence) (which was some nine months prior to the Lord Ordinary's judgment). In upholding this submission the Lord Ordinary referred to two authorities, namely *Commerzbank* and *Fullemann*, and said:⁵¹

The present case is not on all fours with that of *Fullemann* since the pursuers do not seek decree in a foreign currency. This was the point of procedure to which the case of *Fullemann* and the earlier case of *Commerzbank Aktiengesellschaft v. Large*, which dealt with a claim for payment of a debt, were concerned. However, it appears to me that the same principle can be used to support a conversion from the foreign currency to United Kingdom currency at the time of the proof, in respect that this approximates to the time when the duty to pay damages is satisfied. This minimises the risk that the pursuers will suffer prejudice by reason of an adverse fluctuation in the value of the Pound sterling as against the currency in which the loss was sustained.

It is not at all clear what principle is being applied here. The Lord Ordinary is undoubtedly correct in saying that procedurally there is no bar to the Scottish courts awarding decree in a foreign currency. However, his Lordship does not identify the "same principle" which leads to the conversion into sterling at the date of proof of a sum for damages which has been assessed primarily in, and hence whose proper currency is, DM. There appears to be no recognition here that the *Miliangos* principle raises at least two different types of issue. The first is concerned with the procedural issue whether the courts can give judgment in a foreign currency. The second issue is more substantive in nature, i.e. what is the appropriate currency for an award of money as debt or damages and, if the currency is to be converted into sterling, what is the appropriate date of conversion? The Lord Ordinary's comments note that *Commerzbank* and *Fullemann* dealt with the procedural issue but it is difficult to read those cases as authorising a date for conversion into sterling prior to the date of extract or payment. His Lordship appeared to be laying down a principle that it is at the date of proof (trial of evidence) that the duty to pay damages is "satis-

51. *Idem*, 20 Aug. 1993, Transcript, pp.35-36.

fied". But what this phrase means is far from clear. It may be that what is meant is that at that date the duty is crystallised or made obvious but if that is what is being asserted then there is no support for such a proposition in either of the two cases cited by the Lord Ordinary.

This whole matter is thrown into further confusion by the terms of a second judgment issued in this case some months later. After issuing his first judgment the Lord Ordinary put the case out for a further hearing to allow for submissions to be made on various outstanding matters.⁵² In the second judgment the Lord Ordinary announced that at the date of the further hearing before him the parties had agreed that the appropriate exchange rate for conversion of the damages into sterling was that applicable at the date of that hearing (£1 = DM 2.44). The Lord Ordinary further noted that there had been a further fluctuation so that the rate was now £1 to DM 2.46 and said that it was this last rate which he would apply.

Again it is difficult to discern the basis for the selection of the date of judgment as the date for conversion into sterling. If the principle being applied here is that of ensuring that the pursuers receive a sum in sterling which is as near as possible the equivalent of the sum in DM to which they are entitled as damages,⁵³ then, as the *Commerzbank* decision itself indicates, the most appropriate date is the earlier of extract or payment.

There are two other Scottish cases dealing with damages in delict in foreign currency but other than in the context of personal injuries. In *Wimpey Construction (UK) Ltd v. Martin Black & Co. (Wire Ropes) Ltd*⁵⁴ a wire rope sling was supplied by the defenders to the pursuers (a consortium of companies engaged on a construction project). The design of the sling was such that when used it caused damage to various items of equipment belonging to the different pursuers, and also led to delay in completion of the project. It was held that the defenders had been negligent in not informing the pursuers to whom they had supplied the sling about its nature. In the event the Lord Ordinary held that various headings of claim made by the pursuers in respect of economic loss were too remote.

However, one of the claims made by one of the pursuers was for the expenses incurred in replacing a damaged crane, and for acquiring and

52. One of the outstanding issues was the effect to be given to various interim payments which the defenders had made to the pursuers at various stages during the action. The interim awards had been paid to the pursuers in sterling. Initially the parties were at odds as to whether these interim payments had to be converted into DM or instead should be deducted from the final award of damages in sterling (i.e. after conversion from DM). In the event both sides agreed that the interim sums should be converted into DM at the rate of exchange prevailing at the date each payment had been made. These sums were then deducted from the total damages as calculated in DM and the resulting figure was then converted into sterling as the final decree awarding damages.

53. This after all is the principle common to *Miliangos* and subsequent cases and *Commerzbank*.

54. 1982 S.L.T. 239.

transporting parts for the crane. The particular factual background is not disclosed in the report but the pursuers sought recovery of this heading of loss in French francs, with the alternative of that sum in sterling, at the earlier of the date of payment or date of extract. The Lord Ordinary noted that there had been recent developments in English law on foreign currency claims.⁵⁵ However, his Lordship held that there was no need to consider the English decisions, as the form of the pursuers' claim was competent in terms of the *Commerzbank* decision and the defenders did not dispute the appropriateness of an award in French francs. Given this concession by the defenders, and the lack of detail in the report, it is again difficult to derive from this case any substantive principle as to the basis for an award in foreign currency for a claim in delict.

In another case, *North Scottish Helicopters Ltd v. United Technologies Corporation Inc (No.2)*,⁵⁶ however, explicit reference was made to the speech of Lord Wilberforce in *The Despina R*, and in particular to the point that the onus was on the pursuers in any action to prove that their loss was borne in the currency claimed. In this case, the pursuers averred that damage had occurred to one of their helicopters due to the negligence of the defenders. They sought to recover the cost of a replacement helicopter, which they had purchased in US dollars. Their claim was for payment by the defenders of that particular sum in that currency. However, the pursuers failed to show that they maintained a trading account in US dollars, although from time to time they had purchased helicopter components in the United States in US dollars. Accordingly the Lord Ordinary held that the pursuers were entitled only to the cost in sterling of purchasing the US dollars needed to buy the replacement helicopter.

D. Interest

The relationship between claims for sums in foreign currency and interest on such sums has given rise to important and difficult issues.⁵⁷ The complexity of these issues has been brought to the attention of the Scottish courts. In *Fullemann v. McInnes's Executors*⁵⁸ counsel for the defenders made a submission (in the event unsuccessfully) that an award should be made not in Swiss francs as sought by the pursuer but in sterling converted as at the date of decree. He argued that the pursuer was protected against currency fluctuations by the interest running on the sum in the decree.

55. *Idem*, p.248. The Lord Ordinary did not identify these decisions but presumably was referring to *The Despina R*.

56. 1988 S.L.T. 778.

57. See R. A. Bowles and C. J. Whelan, "Judicial Responses to Exchange Rate Instability", in P. Burrows and C. J. Veljanovski (Eds), *The Economic Approach to Law*, p.253 at pp.261-263; and "Judgments in Foreign Currencies: Extension of the Miliangos Rule" (1979) 42 M.L.R. 452, 456-457.

58. 1993 S.L.T. 259.

Given the then position of sterling on the money market, the pursuer would be able to receive a higher rate of interest on a sum in sterling than on a sum in Swiss currency. In the event, however, the Lord Ordinary decided that damages would be expressed in Swiss currency without directly addressing this particular submission.

In *Commerzbank* the Inner House approved a form of decree which awarded interest on the principal sum at the contractual rate of 14 per cent per annum from a specified date (which was presumably the date the pursuers demanded payment from the defender) or the sterling equivalent thereof at the date of payment or extract, whichever was the earlier. This approach is broadly consistent with the accepted principle that where interest is sought on a contractual payment, the proper law of the contract determines both the right to interest and also the rate at which it is payable.⁵⁹ In decrees not involving foreign currency interest is usually stated to run at a specified rate from a particular date until payment. But the form of the decree in *Commerzbank* does not fully take account of all of these features in its attempt to adapt the decree to the requirement to convert the foreign currency into sterling. What is odd about the terms of the decree is that nothing is said about the situation where the defender defaults in making payment on the decree, and the pursuer obtains extract to enforce it.

Where the defender makes payment there is no difficulty because at the date of payment he must pay, either in the foreign currency or in sterling, the principal sum plus interest accumulated to that date. But if payment has not been made, the pursuer must obtain extract of the decree to enforce it. The decree does not, however, provide for interest to run *after* it has been extracted. Accordingly, if there is any delay in enforcing an extracted decree which is in the *Commerzbank* form (and delay may not necessarily be the fault of the pursuer) the result is that the pursuer will not recover any interest for the period between the date of extract and date of eventual payment or execution.

Interest has also been awarded on two foreign currency decrees for damages in delict. In *Wimpey Construction (UK) Ltd v. Martin Black & Co. (Wire Ropes) Ltd*⁶⁰ the court awarded a heading of damages in French francs, as the currency of the pursuers' loss. Interest was awarded on this sum from a date agreed as appropriate by the parties (the date at which the construction project would have been completed but for the damage to the pursuers' equipment). The rate of interest was 11 per cent. No reason is given for this particular rate but 11 per cent was the "deemed" or judicial rate of interest on decrees at the time of the judgment, and it was also the rate of interest awarded in respect of the claims in this case expressed in

59. Anton, *op. cit. supra* n.29 (2nd edn), at pp.378-379 favours this approach.

60. 1982 S.L.T. 239.

sterling.⁶¹ It would appear that the Lord Ordinary applied the usual rate of interest for decrees without any consideration as to whether this rate was appropriate for awards in a currency other than sterling.⁶²

A similar approach was taken in *Fullermann*. In that case an award for solatium was made in sterling. In accordance with normal practice⁶³ interest at a rate of about one-half of the current judicial rate was awarded for the part of the pain and suffering which had occurred prior to decree. On this basis the rate of interest was 7.125 per cent.⁶⁴ However, the pursuer was also awarded various items of patrimonial loss and here the award was made in Swiss francs. In relation to one of these headings part was allocated to the past but the Lord Ordinary applied the same reasoning on interest for this past loss and awarded interest at the rate of 7.125 per cent.

E. Miscellaneous

*Wendel v. Moran*⁶⁵ involved the Scottish procedure at common law to enforce in Scotland a judgment of a foreign court. The pursuers sought payment of a sum expressed in US dollars as conform to a judgment for that sum obtained by them against the defenders in a New York court. No objection was made to the conclusion of the Scottish action being for payment of a sum of money expressed in dollars. However, decree was refused as the Court of Session refused to recognise the New York court as a court of competent jurisdiction, as the New York action was based on the fact that the cause of action arose in the territory of the court.

It may also be the case that the Scottish courts will grant awards of sums as aliment or awards for financial provision on divorce in foreign currency where that currency is more appropriate than sterling. In *L/F Foroya Fiskasola v. Charles Mauritzen Ltd*⁶⁶ counsel informed the court of a case in the Court of Session where decree for payment of aliment had been granted in South African rands. However, this case has not been traced further. In an unreported case, *Brodie v. Brodie*,⁶⁷ the pursuer (the wife) in an action of divorce was at the time of the action living in France. There was a dispute between the parties as to what capital sum should be

61. *Idem*, pp.246, 248.

62. It may be noted that the form of decree was that the defenders were found liable to the pursuers in the sum of FF.728,905 with interest thereon at the rate of 11% p.a. until payment or the sterling equivalent of the said sum and interest at the date of payment or at the date of extract whichever be earlier: *ibid*. This is in the same form as the decree in *Commerzbank* and gives rise to the same problems about interest on the sterling equivalent after extract.

63. R. G. McEwan and A. Paton, *Damages in Scotland* (2nd edn), p.19.

64. This reflected a change in the judicial rate during the period between the accident and the judgment from 12% to 15%. Interest at the full judicial rate is then awarded on the element of solatium which represents future pain and suffering: *ibid*.

65. 1993 S.L.T. 44.

66. 1977 S.L.T. (Sh. Ct.) 76, 77. This case preceded the *Commerzbank* decision.

67. Outer House of the Court of Session, 28 Nov. 1986.

awarded to the woman. At one stage it was suggested that the defender (the husband) would make an undertaking to purchase a flat or home selected by her up to a maximum price of £60,000 or its equivalent in foreign currency. In the event no undertaking was given and the court proceeded to award the pursuer an amount in sterling. It is interesting to speculate as to the procedure to be followed if such an undertaking had been made by the husband. The usual procedure where parties make an agreement as to financial provision on divorce is for the terms of the agreement to be set out in a joint minute, and the court grants decree in terms of the joint minute.⁶⁸ A joint minute in terms of buying a house up to a fixed sum in sterling or the equivalent in foreign currency is presumably protected against dangers of currency fluctuations by the choice of the house being at the option of the wife.

IV. CONCLUSION

OVER the last 15 years or so the Scottish courts have dealt with a wide range of issues concerning decrees in currencies other than sterling. In *Commerzbank v. Large* the Inner House of the Court of Session made it quite clear that there were no procedural barriers in Scots law to foreign currency decrees. That case remains the only truly authoritative decision on this general topic but the judgment of the Court does very little to set out any fundamental or underlying principle, or principles, which can be applied to a broader range of different aspects of foreign currency judgments. In particular it is far from clear whether Scots law has any independent doctrines on foreign currency judgments or, alternatively, whether Scots law completely accepts the approach of English law on this subject. Cases subsequent to *Commerzbank* have tended to follow this same general pattern of relatively unarticulated judicial reasoning. It can only be hoped that in future cases the Court will use the opportunity to state authoritatively and directly the Scots law of foreign currency decrees.

68. E. M. Clive, *The Law of Husband and Wife in Scotland* (3rd edn), pp.508-509.